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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 330

G. T. FOGLE & COMPANY, PETITIONER,

v.

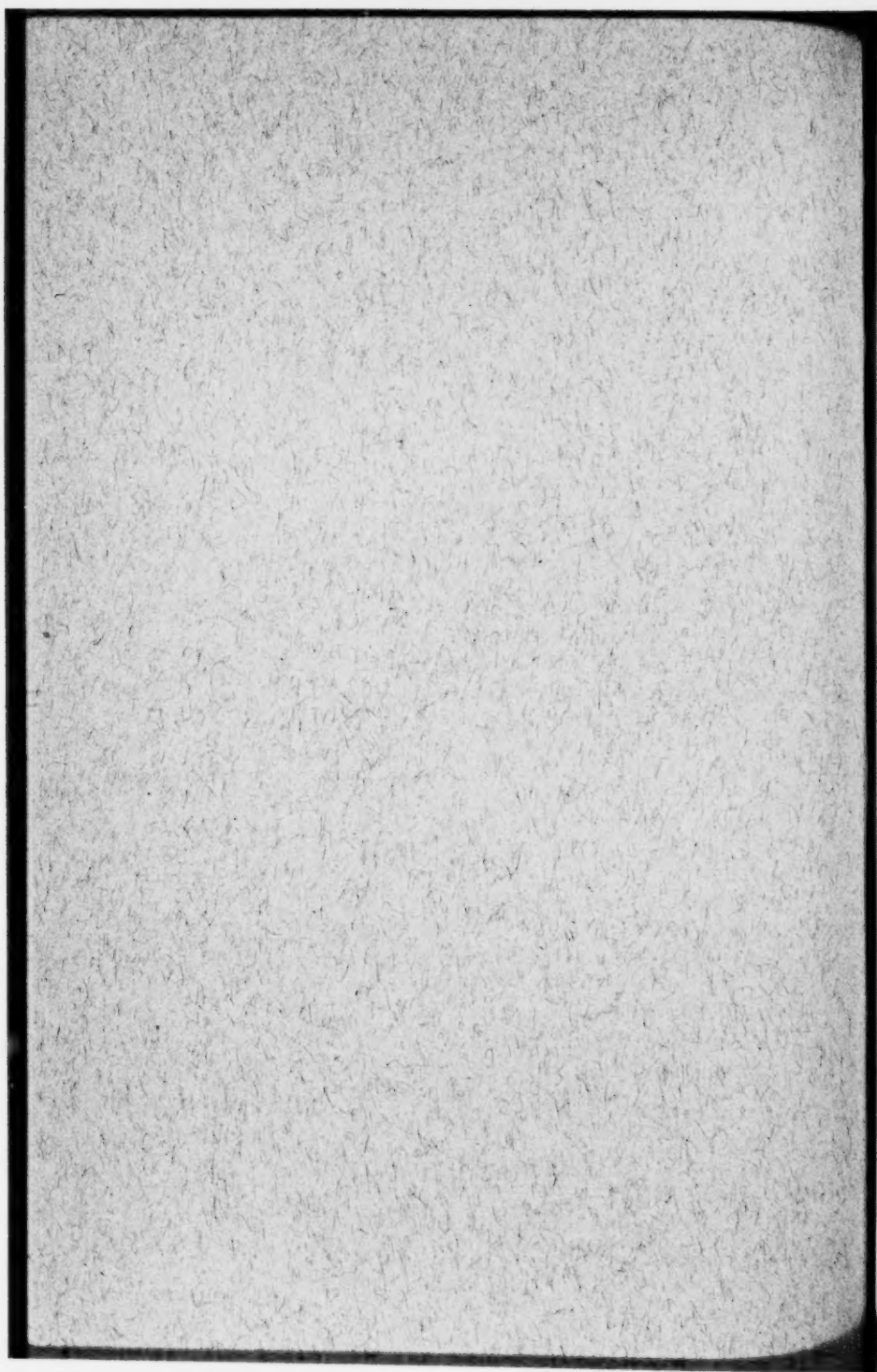
UNITED STATES OF AMERICA.

*On Petition for a Writ of Certiorari to the United
States Circuit Court of Appeals for the Fourth Circuit.*

Petition of G. T. Fogle & Company for a Rehearing of the
Judgment of the Supreme Court of the United States
Herein, Rendered on the 18th day of October, 1943,
Denying Petitioner said Writ of Certiorari.

LILLIAN S. ROBERTSON,
Counsel for G. T. Fogle & Company,
Petitioner.

HENRY S. CATO,
Of Counsel.



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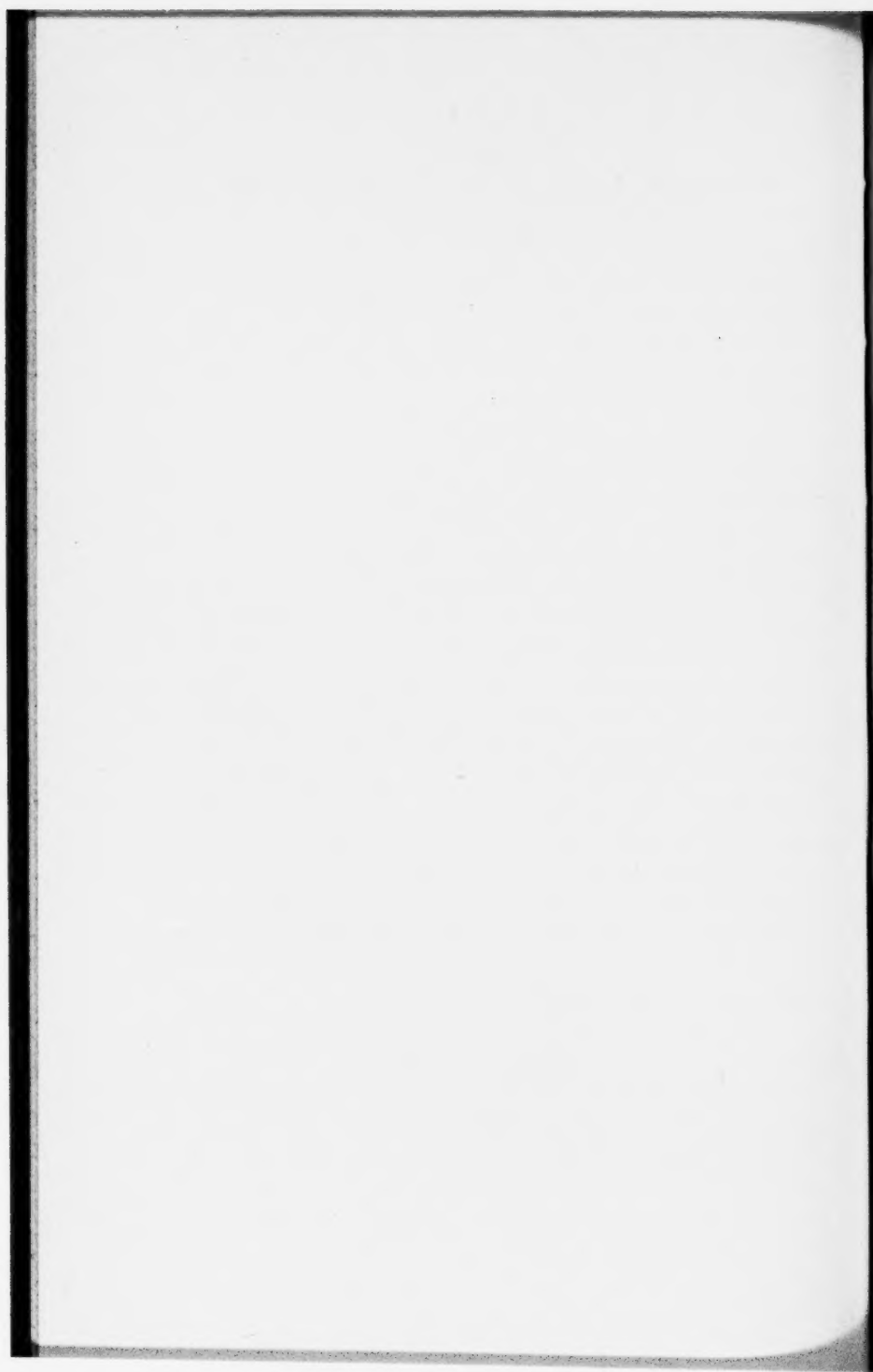
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UNITED STATES OF AMERICA.

*On Petition for a Writ of Certiorari to the United
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**Petition of G. T. Fogle & Company for a Rehearing of the
Judgment of the Supreme Court of the United States
Herein, Rendered on the 18th day of October, 1943,
Denying Petitioner said Writ of Certiorari.**

*To the Honorables, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of
the United States:*

Your petitioner, G. T. Fogle & Company, petitioner
in the above entitled application for a writ of certiorari
to the judgment of the United States District Court of
Appeals for the Fourth Circuit, respectfully represents
that it is aggrieved by the judgment of this honorable

court, rendered herein on the 18th day of October, 1943, denying to it said writ of certiorari.

Petitioner says that it duly filed its petition for said writ, and brief in support thereof, in this court on the 7th day of September, 1943; and that the Solicitor General duly accepted service of said petition, brief, and transcript of the record upon respondent on, to-wit, September 11th, 1943; that the brief of respondent in opposition to the granting of said writ was filed on or about October 2nd, 1943, and copies thereof furnished to counsel on October 4th, 1943; that the exact dates of such acceptance of service and filing of opposition brief by respondent's counsel are unknown to petitioner, but will be shown by the record thereof in the office of the clerk of this court; but no question is made or intended to be raised by petitioner as to whether respondent's brief was filed within the time prescribed therefor, and if not so filed petitioner waives any right it may have had or now has to object upon this ground to the filing or consideration thereof. But petitioner says that all events, between the time said brief reached the hands of petitioner's counsel and the time of the convening of this court and the presentation of said petition and briefs of counsel thereon for its consideration, it was impossible for petitioner's counsel to prepare and file a reply to respondent's brief, and that in fairness to petitioner it should be given opportunity to present its reply to said brief, for the consideration of this court before its judgment denying said writ of certiorari shall become foreclosed; this for the following reasons, among others:

That petitioner's contentions upon said application were:

1. That in the contract for the rental of the mixer for 100 hours at seventy-five cents per hour there was a necessarily implied promise by the Government to operate the equipment for the full one hundred hours.

2. That under the contract for the rental of the shovel, with operator, for three months at \$400.00 per month, the monthly rental was only subject to abatement for shovel time lost by the mechanical failure of the shovel to operate or the absence of the shovel operator; *illicit* under the contract for the rental of the second mixer for one month, on account of its inoperable condition.

3. That the contracting officer for the Government and the executive officers of the Works Progress Administration gave a like construction to all three contracts, and the contracting officer made formal finding and report to the Comptroller General that all three had been breached by the Government, to petitioner's damage.

4. That the Comptroller General had rejected petitioner's claim under all three contracts, referred to him at the direction of the Deputy State Administrator by the State Procurement (contracting) Officer, upon the sole ground that the claim under each was for damages for breach of contract by the Government; that under Section 3678, Revised Statutes, appropriations made for expenditure in the public service were required to be expended solely for objects for which they were respectively made, and no others; and that the appropriation to Works Progress Administration did not provide, expressly or by implication, for the payment of damages, and there being no appropriation available therefor,

there was no authority for the payment of the claims, or any of them. R. 21, 22, 23.

That the appellate court, without reference in its opinion and judgment to the construction given the contracts by either the Government's contracting officer, its executive administrative officers, or the Comptroller General, or even an indication that any construction by any of them had been given thereto, held that under Par. 5 of printed Form S. P. O. No. 7, providing that payment of rental would be made only for "actual operating time", all three contracts were mere options to the Government to use the equipment, and, it not having been used, there was no breach of the contracts by the Government.

That in the brief for the Government its counsel, after stating that "the only issue is whether under the particular circumstances petitioner has established a breach of contract entitling it to recover", take the position that the decision below is clearly correct, because:

1. The contracts were nothing more than options,— "offers by petitioner for the execution of unilateral contracts, which could ripen into 'valid and binding' agreements only if and when accepted by the Government's actual use of the equipment"; and that there was no necessarily implied promise by the Government in the first contract to use the mixer for the full one hundred hours for which the latter rented it. To this point were cited numerous decisions of this court, including some of those cited by the lower court in its opinion.

2. The contracting officials of the Government did not accept petitioner's view of the Government's com-

mitment (obligation) under the contracts, and did not even express an opinion that the latter had breached the contracts and was liable in damages therefor.

3. That the ruling of the Comptroller General rejecting petitioner's claims for damages under the contracts "was based principally" on the fact that Par. 5 of Form S. P. O. No. 7 obligated the Government only for "actual operating time", and petitioner's equipment was admittedly never used by the Government.

4. That in the second and third contracts there was no repugnancy between Par. 5 of the printed Form S. P. O. No. 7 and the express typewritten provision in each controlling the abatement, under that provision, of the monthly rental; but this provision made "doubly clear" the intention of the Government to obligate itself only for the "actual time" that petitioner's equipment was in use.

Petitioner says that none of the cases cited in respondent's brief sustains said first contention, but to the contrary a number of them sustain petitioner's construction of said contracts; that the admittedly undisputed and documentary facts shown by the printed record refute the second and third factual contentions of said brief; and that under the uniform decisions of this court over a period of more than fifty years the fourth contention of said brief is wholly untenable and devoid of merit.

Petitioner respectfully presents herewith a note of argument in the nature of a reply to said opposition brief for respondent, and asks that it be read and considered in support of this petition; and for the reasons assigned in its original petition and supporting

brief for the granting of said writ of certiorari, as well as those assigned herein, petitioner prays that its application therefor may be reconsidered and reheard, and upon such rehearing granted, and the judgment and opinion complained of reviewed and reversed by this honorable court.

Respectfully,

G. T. FOGLE & COMPANY, PETITIONER.

By Counsel.

LILLIAN S. ROBERTSON,

Counsel for Petitioner.

HENRY S. CATO,

Of Counsel.

United States of America,

State of West Virginia,

County of Kanawha, to-wit:

We, Lillian S. Robertson, counsel for petitioner in the above entitled action and proceeding, and Henry S. Cato, of counsel therein, do certify that the foregoing petition for a rehearing of the application for a writ of certiorari made therein is presented in good faith and not for delay.

Given under our hands this 4th day of November, 1943.

LILLIAN S. ROBERTSON.

HENRY S. CATO.

NOTE OF ARGUMENT IN SUPPORT OF PETITION
FOR REHEARING.

The authorities cited by respondent do not support the lower court's interpretation of the contracts as mere options,—offers by petitioner for the execution of unilateral contracts —, or its interpretation of the first contract as not containing a necessarily implied promise by the Government to operate the mixer for the full 100 hours stipulated in the contract.

Taking the cited authorities upon this point in their order, and beginning with those originally cited in the lower court's opinion, *Brawley v. United States*, 96 U. S. 168, the "cordwood" case, was a typical "more or less" contract with the Government, and the contract therein clearly distinguishable from the mixer contract in both facts and principle. This distinction is pointed out at considerable length in petitioner's supporting brief, at pages 55 and 56, and need not be repeated here.

Simpson v. United States, 199 U. S. 397, involved another "more or less" contract with the Government for furnishing fresh beef to troops stationed in the interior of the island of Cuba, as their commanding officers "from time to time * * * may require". The only questions presented for decision were, first, whether the above quoted words meant such quantities as the commissaries might make requisition for, or such quantities as they might need; and, second, whether the camp at Los Quemados was "situated within the interior of the island" within the true intent of the contract; and this court, deciding the second question against the claimant, held that such decision, in disposing of the case, disposed of the first question. The court further

held that a conversation of the claimant with the Commissary General before the contract was made, in which the latter stated, in effect, that it was the purpose and intent of the Department to contract with claimant for fresh beef for the entire island of Cuba, both interior and seacoast, when Swift & Company could not furnish refrigerated beef, was inadmissible as flying in the face of the written contract, which confined the undertaking of the United States to beef for camps in the interior, and even if admitted would not be definite enough to change the plain meaning of the written words; citing *Brawley v. United States*, *supra*, and *Simpson v. United States*, 172 U. S. 372, 377. The latter case, parenthetically, the only one cited in either the lower court's opinion or respondent's brief to the point under discussion which is not a "more or less" contract case, is interesting as being the direct converse of the present case. It involved the interpretation of a contract for the construction of a dry dock at Brooklyn Navy Yard, according to plans and specifications prepared by the *contractors*, upon a site to be selected by the United States. It was recited in the opening portion of the specifications that the dock was to be built in the navy yard upon a site which was "available". In the course of excavation for the foundations of the dock the contractors encountered quicksand, the presence of which delayed the completion of the work. Nearly three years after it was completed, and the contractors had been paid the full contract price, they made claim for a large amount for extra services rendered and material furnished upon the ground that the site was not "available", owing to the unfavorable and unsuitable character of the soil. This court held that there was no statement, agreement, or even intimation in the contract of any warranty, express or implied, by the United States

as to the character of the underlying soil, and that no such guaranty or warranty could be evolved "by a forced and latitudinarian construction of the word 'available'", used only in the nature of a recital in the specifications, prepared by the contractors, and not in the contract. In the present case the Government prepared the mixer contract and the general specifications thereof (Form S. P. O. No. 7), and the contractor agreed to the perfectly clear provision of Par. 5 of the specifications that it was only to be paid for the hours the mixer was actually operated—its use hours—, this being the only way in which equipment rented by the hour could be paid for. But the lower court, "by a forced and latitudinarian construction" of the words, "Payment will be made only for such actual operating time", contrary to their intrinsic, natural meaning when read as a part of the entire contract, found that these words made it optional with the Government, after delivery of the equipment, in good operating condition, upon the government work, to operate it at all, and the contractor took the risk that it would never be operated, and there would be no actual operating time, and consequently no payment of rental. In the circumstances it may be of some significance that though cited and relied upon in the lower court's opinion counsel for respondent made no mention of this case in their brief.

Bulkley v. United States, 19 Wall. 37, 40, involved the construction of a "more or less" contract for the transportation of army supplies. Bulkley agreed to transport any quantity of such supplies—between 100,000 and 10,000,000 pounds—that might be turned over to him for that purpose within a fixed period, upon due notice to him of the quantity, etc., to be transported at any one time, the period of notice to be according to the quan-

tity specified. He received notice that transportation for 1,700,000 pounds was needed, together with an inquiry as to whether he was prepared to transport that additional quantity of freight, replied that he was, and went to the expense of such preparation. The United States did not need transportation for 1,690,074 pounds of the quantity covered by its notice, and did not offer this freight poundage to him. The court held that Bulkley's contract was to transport such freight, in such quantities, as should be offered to him, but there was no agreement by the Government to furnish him any freight; and that while under the contract he could not recover as damages the profits he would have made had the freights withheld been furnished him, he was entitled to recover for the expense to which he was subjected in making ready under the government's notice to transport the withheld freight. Mr. Justice Swayne, delivering the opinion, says in discussing the contract:

"There is * * * no agreement to furnish such freights or any freights; the effect of the notice (that transportation from Fort Leavenworth of 1,700,000 pounds was needed, and that Bulkley should prepare to handle it) was to signify a purpose on the part of the government, and that purpose was liable to be changed at any time before it was executed. * * * It was doubtless known to the officer who entered into the contract on behalf of the United States that in the exigencies of the public service more or less transportation, or none, might be required at any given time and place, contrary to what had been specified and intended down to the last moment. Hence, while it was stipulated that actual transportation should be paid for at the rates specified, an unfettered discretion was reserved to the government as to everything beyond that point.

* * * It (the contract) committed the government to nothing but to pay for services rendered.
 * * * In making ready to meet the requirements of the notices Bulkley was subjected to the loss of time, to trouble, and expense. He is entitled to be paid accordingly. Such is the implication of the contract, *and what is implied in a contract * * ** is as effectual as what is expressed. *Human affairs are largely conducted upon the principle of implications."*

Lobenstein v. United States, 91 U. S. 324, was a suit upon contracts with the United States for all hides of beef cattle slaughtered for Indians which the Superintendent for Indian Affairs should decide were not required for their comfort. No cattle were in fact slaughtered for the Indians, but the cattle were turned over directly to the Indians, who slaughtered them and took the hides. It was held that the order of the Commissioner turning over the cattle to the Indians was in effect a decision that the hides were required for their comfort, and excused the United States from delivery to the contractor; and that the estimate of the number of hides—about 2,000, more or less, and about 4,000, more or less—, as made in the contracts, created no obligation on its part to deliver that number, as the conditions of the agreement rendered it impossible for either party to determine how many would be reserved for the Indians.

Kihlberg v. United States, 97 U. S. 398, involved a contract similar to that in the *Bulkley Case*, for the transportation of military and other government supplies in any number of pounds between 100,000 and 10,000,000, at an agreed compensation of so much per mile for each

one hundred pounds delivered, the distances to be ascertained and fixed by the Chief Quartermaster, and the quartermaster at the point of delivery to fix the number of pounds delivered. The contractor sued on the contract upon the theory that he had hauled the supplies a greater distance than found by the chief quartermaster, and that he was entitled to payment according to the number of pounds received for transportation in all cases where the loss in weight occurring during transportation was without neglect on his part. The court held that the action and finding of the chief quartermaster, in the absence of evidence of fraud or bad faith, in the matter of distances, was conclusive upon the parties, and that the contractor was only entitled to recover for the number of pounds actually delivered by him. Just why this case is cited is not apparent, unless it was in support of the assertion in the brief that "there is no evidence of fraud or bad faith on the part of the Government in failing to use the equipment." This *ipse dixit*, appearing also in the lower court's opinion, is refuted by the record, which shows, in the petition herein, the fact, sworn to in the petition to the Works Progress Administration made a part of the petition here, a photostatic copy of which original petition is exhibited with the Government's answer, and again sworn to in the petition herein, and never questioned or denied either in the pleadings or by any officer or agent of the United States, that this mixer was requisitioned by the Works Progress Administration, and delivered to it at West Hamlin, with full knowledge on the part of the receiving agents of the Government, at the time of such delivery, that it never had been needed on the work, had been requisitioned in error in the first instance, and never would be used or operated on the project; and that with such full knowledge

it was held on the project for more than four months before the owner was notified, in answer to its inquiry regarding unpaid rental, that the equipment had never been used "on account of adverse weather conditions", —a knowingly false statement—, and might be removed from the work. If this is not evidence of bad faith on the part of the agents of the Government, which can act only through agents, what would be such evidence?

Willard Co. v. United States, 262 U. S. 489, 493, 494, involved yet another typical "more or less" contract, for furnishing coal to the government, in which it was "distinctly understood and agreed * * * that the contractor will furnish any quantity of the coal specified that may be needed * * * irrespective of the quantities stated, the government *not being obligated to order any specific quantity* (Italics the court's)." In a suit to recover the market instead of the contract price for a portion of the coal delivered the *contractor* contended that its contract was not enforceable, for lack of consideration and mutuality, and therefore did not control the price of that part of the coal delivered under protest. This court held that there being nothing in the writing "which required the government to take, or limited its demand to, any ascertainable quantity", for lack of consideration and mutuality the contract was not enforceable; distinguishing it from the contract in *United States v. Purcell Envelope Co.*, 249 U. S. 313 (petitioner's brief, pp. 66-68), in that "there, the making and acceptance of the bid consummated the contract, and it was construed to bind the company to furnish and the Department to take the envelopes and wrappers specified which the department would need during the period covered by the contract". But the court further held that while the contract at its incep-

tion was not enforceable, it became valid and binding (upon the contractor) to the extent that it was performed by the latter. In the present case, by the making and acceptance of petitioner's bid (on the back of which the Government's contracting officers are instructed that "this form (Standard Form 33, Revised) meets the requirements of a formal contract (R. S. 3744)"), there was a consummated contract binding the Government to rent the mechanical services of the mixer in the fixed, definite quantity of 100 (use) hours, and the petitioner to deliver the equipment to the lessee, and keep it in good repair, until that quantity of services, measured in use hours, was furnished by it.

Atwater & Co. v. United States, 262 U. S. 495, 498, was a companion of the *Willard Case*, involving the same "more or less" contract for coal delivery, and decided upon the same principles. Here again the contractor raised the same question of lack of mutuality and consideration in the contract, and the court held, on the authority of the *Willard Case*, "that by the language of the contract the parties intended that the Department might call for more or less than the 200 tons mentioned therein, and that because of lack of consideration and mutuality the contract at its inception was not enforceable, but that it became valid and binding to the extent that it was performed." The court cited to the latter point *Charles Nelson Co. v. United States*, 261 U. S. 17, 67 L. Ed. 513, 514, in which case, involving a "more or less" contract for lumber for the Navy Department, the contractor denied that the writing signed by it was a binding contract, because there was no mutuality of obligation; but the government answered by citing the *Purcell Envelope Co. Case*, *supra*, and the court, distinguishing the latter at some length,

held that the question of lack of mutuality did not arise there, as it did in the lumber contract.

North American Com. Co. v. United States, 171 U. S. 110, 127, involved a suit by the Government upon "a so called lease" of seal fisheries in Behring Sea, for the recovery of annual rent reserved, the per capita bonus, and revenue tax upon each seal taken under the contract. The contract fixed the maximum number of seals that might be taken, which might be reduced by the Government, and provided for a proportionate reduction of the yearly rental in case of such reduction. For the year covered by the suit there was a reduction of this maximum number from 100,000 to 7,500. The contractor contended that not only the rental but the per capita royalty should be proportionately reduced. The court, denying the contractor's right to any per capita royalty reduction, after pointing out that it was directly to the interest of the Government under the contract to allow the largest possible catch, and to exercise great circumspection in prescribing any limitation of it, said, at page 127:

On the other hand, it might be that each seal would cost more as the number taken was less, and that if the price of skins did not keep up, the company might be subjected to a loss, no matter how many it took, and the loss might be greater the more it took. *But that was a risk the company assumed, and no reason is perceived for relieving it from the consequences."*

The italicized language above, taken from its context, is quoted with a note of finality in respondent's brief. Any contractor, buying anything for resale, be it seal skins, shoes, ships or sealing-wax, takes the risk of its

costing more than he can sell it for; and in this sense petitioner took the risk that the cost of transporting its equipment to and from the Government work, and maintaining and repairing it in 100 hours of operation, plus the wear and tear thereon, would be more than the \$75.00 which the Government expressly agreed to pay for its use; but petitioner certainly did not anticipate, or have reason to anticipate, and consequently did not risk, the repudiation of this contract by the Government upon the ground of lack of mutuality and consideration on its part, rendering the contract unenforceable against it, as respondent's brief for the first time admits to be the effect of the lower court's construction of the Government's liability.

Summed up, all of the cases cited in respondent's brief to the point under discussion involve "more or less" contracts for the *sale*, or *delivery*, or both, of perishable or consumable goods or materials in quantity to or for the Government, and the question in each is what *quantity* of material was to be sold or delivered, and paid for on delivery; in none of them is there any question but that the quantity *delivered* is to be paid for. None of these cases involves a *lease* or *rental* of nonperishable or nonconsumable material, or a unit or units of heavy machinery for use by the Government. To the instant contract their "comparisons are odorous", as the most casual inspection of that contract must show. It is executed on the Government's Standard Form 33 (Revised), which form is titled "Invitation, Bid and Acceptance (Short Form Contract)". It invites petitioner (and eighteen others) to bid or offer, "subject to the conditions on the reverse hereof", to furnish "the following supplies, and/or services for delivery by truck to

West Hamlin, Lincoln Co., W. Va. Delivery required immediately”:

“Item No. 1, Rental, 1 7 cu. ft. or 1 bag concrete mixer 10 hours Quantity, 1; Unit, hr.; Unit Price, Per hr.”

In the invitation section of the form petitioner wrote: “1 bag “Jaeger” concrete mixer * * * Seventy-five (75) cents per hr.”; and its bid or offer, made in the bid section of the form, was:

“September 11th, 1935. In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers and agrees, if this bid be accepted within 2 days from the date of the opening (Sept. 13), to furnish any or all of the items upon which prices are quoted at the price set opposite each item f. o. b. at West Hamlin, W. Va., and unless otherwise specified within days after receipt of order”. The bid was signed by petitioner’s treasurer, sealed, and duly delivered to the Procurement Division of the Treasury Department. It was accepted by the Government on the acceptance section of the form, which section is titled “Acceptance by the Government”, as follows:

“September 17, 1935. Accepted as to items numbered . . . all
(Date)

Name J. R. Downey Title Purchasing Assistant”

The apology for “spelling out” this contract, as it appears in the original in the certified record (Respondent’s brief, foot-note 1, page 3), is that by so doing it speaks for itself as being a bilateral agreement, with

none of the elements of an option, and the complete antithesis of the "offer by petitioner for the execution of a unilateral contract, which could ripen into a 'valid and binding' agreement only if and when *accepted* by the Government's *actual use of the equipment*"—that is, if there can be a negative of such a hybrid positive—which respondent's brief gives form and definition as the measure of the Government's obligation. There are two elements in an option contract: First, the offer to sell, which does not become a contract until accepted; second, the completed contract to leave the offer open for the specified time; and these elements are wholly independent. *Hanly v. Watterson*, 39 W. Va. 214; 19 S. E. 536, 538. "An option is an *unaccepted* offer. It states the terms and conditions on which the owner is willing to * * * lease * * * if the holder elects to accept them within the time limited. If the holder does so elect he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract". *Johns v. Elkins*, 63 W. Va. 158, 162; 59 S. E. 961; *McMillan v. Philadelphia Co.*, 159 Pa. 142. Here there was an offer by petitioner to rent the equipment for a definite time, at a definite price, and if this offer was accepted *within two days after the opening of the bids to deliver* the equipment to the Government, by truck, f. o. b. West Hamlin. There was no agreement to leave the rental offer open for any period of time, hence there was no option contract even in its inception. The bid was opened on September 13th, and petitioner's offer was *accepted* by the Government on September 17th, and "Accepted as to items numbered . . . all"—not for 100 hours, "more or less", or with any other qualification. This acceptance consummated the formal contract between the parties, bilateral, mutual, and upon sufficient consideration, and upon its face and

by its express terms excluding interpretation as an option or *unaccepted* offer, unenforceable against the Government. This court's decision in *United States v. Purcell Envelope Co.*, *supra*, upon the authority of *Garfield v. United States*, 93 U. S. 242, that "the making and acceptance of the bid consummated the contract", together with its applications of that decision in the *Willard Company Case*, the *Atwater & Co. Case*, and the *Charles Nelson Co. Case*, *supra*, forecloses against the Government the contention that the instant contract bore such "scant obligation upon the part of the Government." Counsel for petitioner, in its original brief (page 74), made the considered assertion that no contracting officer for the Works Progress Administration, or any one else in the construction business, ever heard of, much less made, such a contract as the lower court construed the present one to be; and the intensive but futile search of Government counsel for a precedent to sustain that construction at least tends to bear out and confirm what "at first blush" might have seemed an overstatement. Certain it is, at all events, that the making of such a contract with the Government or any one else "must inevitably cast a reflection upon the sanity" of the owner of the equipment. *Coghlan v. Stetson*, 19 Fed. (C. C.) 727 (Petitioner's Brief, p. 68 *et seq.*).

To the point urged in respondent's brief that a necessarily implied promise by one of the parties to a contract cannot be found by judicial exposition unless the contract is ambiguous, there is cited the holding of this court in the *Kihlberg Case*, above discussed, that the contract there considered expressly providing that the Quartermaster General should solely determine the freight haulage distances, "no exposition is allowable contrary to the express words of the instrument". Not

only does petitioner have no quarrel with this statement of the law in that case, but it has consistently relied upon this principle in its application to the instant contract, urging that the express words of the instrument showing that petitioner, as lessor, and the Government, as lessee, rented the equipment for 100 hours, an exposition or interpretation of the contract, contrary to its express words, as a mere option to the Government to use it for 100 hours, "more or less", never accepted, was not allowable. However, if the *Kihlberg Case* is relied upon as supporting respondent's position that no necessarily implied promise can be read into and treated as a part of a written contract by judicial construction unless the language of the contract is ambiguous, the answer to that position is, first, that no question of an implied promise arose in the case, nor is there even a shadow of ambiguity in the language of the contract there considered; and, second, that judicial interpretation of the necessary implications of a contract is not restricted by any condition precedent that the contract must be ambiguous; the scope of such interpretation is much broader, and it may be and should be exercised where and whenever the implied provisions "are indispensable to effectuate the intention of the parties, and * * * arise from the language of the contract and the circumstances under which it was made." *Sacramento Navigation Co. v. Salz*, 273 U. S. 325; *Great Lakes, etc., Transp. Co. v. Scranton Coal Co.*, 239 Fed. 603; and authorities cited at pages 40-50, petitioner's supporting brief. Finally, petitioner is indebted to respondent's counsel for the citation of this court's decision in the case of *Bulkley v. United States*, 19 Wall. 37, 40, *supra*, where Mr. Justice Swayne puts this principle of interpretation, the scope of its application, the whole rationale of the principle itself, and petitioner's entire contention

upon this point, into two brief sentences:

“What is implied in a contract * * * is as effectual as what is expressed. Human affairs are largely conducted upon the principle of implications.”

The contracting officials of the Government, acting within the scope of their authority, formally and in writing accepted petitioner's view of the Government's obligation under the contracts, and expressed their opinion that the Government had breached each and all of them.

Respondent's brief (foot-note 7, page 9), expresses “real doubt” of the above proposition. Here is the record to support it, taken from the letter of the United States Treasury Department Procurement Division to the United States Treasury Accounts Office, at Charleston, West Virginia (R. 10-15).

Claim No. One, Mixer.

“Claimant avers that the equipment was held by the Works Progress Administration for a period of four months, and the claim is based on *damages sustained* by the fact that the equipment was *held and not used*, thus causing a loss of income that may have accrued should the equipment have been either *used* by the Works Progress Administration or surrendered to the possession of the claimant. * * * The statements made by the claimant that the equipment was held by the Works Progress Administration for the period stated are confirmed” (R. 10-11).

Claim No. Two, Shovel.

“At the time this equipment was rejected a

shovel of 1½ cubic yard capacity was requisitioned and later used for completion of the work on the project. Your attention is called to the reason given for the rejection of the claimant's equipment *in that the rejection was not based on the fact that the equipment did not meet with the specifications of the contract.* * * * This claim is not for actual services but for *liquidated damages by reason of violation of contract* * * * (R. 12).

Claim No. Three, Mixer.

"A request for cancellation of the incumbrance provided for this contract * * * indicated *'equipment was requisitioned in error after completion of project; a balance of \$9.18 is being left on this purchase order as claim for such amount was made by vendor to cover cost of moving'*" (R. 13).

As to All Three Claims.

"* * * There is no question in the mind of the Procurement Officer but that the contractor was damaged financially by reason of the *Government failing to complete* the three contracts covered by the first three claims." (R. 14)

To borrow a rhetorical question from the lower court's opinion, "What could be more free from ambiguity than the clear statement that"

"* * * The contractor was damaged financially *by reason of the Government failing to complete the three contracts.*" (All italics ours)

The ruling of the Comptroller General rejecting petitioner's claim for damages under the contracts was based solely upon the ground that the claim under each was for damages, and the appropriation to Works Progress Administration did not provide expressly, or by implication, for the payment of damages therefrom.

Respondent's brief asserts (p. 5) that the ruling of the Comptroller General rejecting petitioner's claims for damages under the three contracts "was based principally" on the fact that Paragraph 5 of S. P. O. No. 7 obligated the Government only for "actual operating time", and petitioner's equipment was admittedly never used by the Government. (R. 21-22, 23)." It is believed that this assertion was inadvertently made, for the very record pages referred to wholly refute it. Here is what the record shows:

As to the mixer:

"* * * The mixer admittedly never having been used, your claim becomes one in the nature of damages, *not for rental, but for the failure of the Government to use the mixer.* Your claim is not one for compensation under the contract, but is one for *damages on account of the alleged breach thereof by the Government.*

"Under Section 3678 Revised Statutes appropriations made for the various branches of expenditure in the public service are required to be expended solely for the objects for which they are respectively made and for no others.

"The appropriation herein involved does not provide expressly, or by implication, for the payment of damages. Consequently it appears there is no authority for payment of this portion of your claim." (R. 21, 22)

As to the shovel:

"Even though it be admitted, as alleged, that the equipment was rejected in error, the fact remains that no usage was made of the subject equipment * * *, hence * * * no payment of rental therefor can be made.

"This portion of your claim being one for anticipated profits and *in the nature of damages for breach of contract* by the Government is not for payment inasmuch as no appropriation is available therefor." (R. 22)

As to the second mixer:

"* * * Upon delivery same was rejected, the project having been completed and there being no need for the mixer.

"It is alleged the payment of \$9.18 was incurred as the cost of delivery, for which amount claim is made. Said claim *being obviously one for damages* is likewise not for payment, *there being no appropriation available therefor.*" (R. 22, 23)

The express written provisions of the second and third contracts dominate and control their printed provisions.

If to cite the uniform decisions of this court over a period of fifty years (Pet. 59-62) in support of this proposition is to "spell out" the repugnancy between the printed and the express written conditions common to both contracts, then petitioner must "own the soft impeachment" of respondent's brief. Paragraph 12, the concluding paragraph, of Form S. P. O. No. 7, provides that the form "shall be attached" to Standard Form 33 (Revised), and that "the conditions therein provided

shall likewise apply *so far as applicable*". (R. 9) The condition of Paragraph 5 of the form, while applicable to the first contract of rental, by the use hour, is not applicable to a monthly rental, at a monthly rate, where the payment of the monthly rental is not conditioned upon the operation of the equipment, but is to be made at all events. And because this printed condition was inapplicable to the monthly rental contracts, and was so recognized by the experienced contracting officers for the Government, they wrote into the invitation for bids this special provision of the monthly contracts that the contractor must bear any loss to the Government occasioned by the mechanical break-down of his equipment or the absence of his operator, and abate the monthly rental accordingly, such abatement to be made in either or both of the two events specified; and the expression of these two reasons for deduction from or abatement of the monthly rental, upon familiar principles, excluded any and all other grounds for deduction or abatement. The printed condition and the express written condition in each contract are so clearly irreconcilable and so obviously repugnant, and the hornbook law that the written provision must control so long settled by this court and so universally recognized, that petitioner cannot believe the argument for respondent to the contrary, measurably ingenious but none too ingenuous as it is, to be anything "more than dialectical", and impelled by the exigencies of defending a legally untenable position.

Petitioner's mixer was taken without just compensation within the meaning of the Fifth Amendment.

Respondent's brief asserts that the property of petitioner in question was in no sense "taken" by the Gov-

ernment within the meaning of the Fifth Amendment, but to the contrary "was delivered by petitioner to the site of the project for a specific period, pursuant to a contract voluntarily made and specifying the conditions under which petitioner was to be paid". The trouble with this argument is that while petitioner, in good faith, *delivered* its property to the agents of the Government under the written contract, these agents *took* and *held* the property for four months with knowledge at the time of taking it that it would never be used and never be paid for, under the conditions of the contract or otherwise, and then, "piling Pelion on the top of Ossa", gave the knowingly false excuse for such taking and withholding that "adverse weather conditions" prevented the use of the equipment. The authorities cited in support of respondent's position in the matter not only fail to do so, but to the contrary support that of petitioner. In *Ball Engineering Co. v. White & Co.*, 250 U. S. 46, 57, this court, quoting from *United States v. Lynah*, 188 U. S. 445, 462, 465 (Pet. Brief, 79), says:

"The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to Act of Congress, as private property to be applied for public uses'; or, in other words: 'Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.'"

And in *United States v. North American Co.*, 253 U. S. 330, it is held:

"When the Government, without instituting condemnation proceedings, appropriates for the public use, under legislative authority, private

property to which it asserts no title, it impliedly promises to pay therefor.

The test in all these cases is whether the Government has title to the property taken; if it has title (as in *Klebe v. United States*, 263 U. S. 188) there can be no implied promise to pay therefor; if it asserts no title, there is an implied promise to pay for the property. Here, of course, the Government claims no title to the mixer; and its refusal to pay compensation therefor is based upon its possession of the mixer under a contract to pay such compensation which it now repudiates as unenforceable against it from the inception of the agreement, and, consequently, when such possession was acquired. May the Government, with any degree of consistency, rely upon this contract to sustain the taking of petitioner's property, and repudiate it to avoid the payment of compensation therefor?

All of which is respectfully submitted.

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